

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

ROBERT McCAFFREY, et al.,

No. C 03-2082 WWS

Plaintiffs,

v.

**MEMORANDUM OPINION
AND ORDER**

BROBECK, PHLEGER & HARRISON,
L.L.P.; MORGAN, LEWIS & BOCKIUS;
and DOES 1-99,

Defendants.

Defendant Morgan, Lewis & Bockius (“Morgan Lewis”) moves for summary judgment on plaintiffs’ claims that Morgan Lewis is liable for having failed to give plaintiffs the notice required by federal and state law prior to their termination. Plaintiffs Robert McCaffrey, Neil Holloway, Tamara Frankhouser, Sandra Moore, Barbara Chaney, Clare M. Huntensburg, Charlene A. Carnell, Lynn Clecker, Lynette L. Craig-Harris, Querlyn Esther Moron, Jean A. Ramos, Patricia English, Cindy Milton, Dennis Grasser, Lisa L. Holland, Christopher Alksnis, Terry Ziegler, Kathleen McWilliams, Laurence W. Tinsley, David Liebendorfer, Linda L. Turner, Katherine Wood, Chris Bender, Steven S. White, Mark Hartwell, Regina I. Rodriguez, James K. Lewis, Jayne Loughry, Elizabeth Hartwood, Cheryl Hamill, Hector Carlos, Leslie H. Evans, Kevin M. Collins, Jorge Molina, Alana Searle, Mark Bevans, George Byron, Imberly L. Vinal, Kirstin Wolf, Roberta Weathers, and Jill C. Youkel oppose the motion.

1 The court, having considered the papers filed by the parties and heard the argument of counsel,
2 GRANTS Morgan Lewis's motion for summary judgment on all of plaintiffs' claims.

3 BACKGROUND

4 Plaintiffs are former employees of defendant Brobeck, Phleger & Harrison, L.L.P.
5 ("Brobeck"), who were terminated from their jobs on February 14, 2003, as a result of Brobeck's
6 decision to dissolve the partnership. Plaintiffs contend that they were entitled to, but did not receive,
7 sixty days' advance notice of their impending termination pursuant to the federal Worker Adjustment
8 and Retraining Notification (WARN) Act, 29 U.S.C. § 2101 et seq., (the Act) and its California
9 counterpart, California Labor Code § 1400 et seq. Plaintiffs also assert a claim against Morgan Lewis
10 under California Business and Professions Code § 17200.

11 Plaintiffs allege that Morgan Lewis is Brobeck's purchaser and/or successor and/or was their
12 employer at the time of the termination of their employment and is, therefore, liable for having failed to
13 give the requisite notice prior to that termination.¹ In support of this contention, plaintiffs point to the
14 following undisputed evidence. Fifty-seven of the approximately 170 former Brobeck partners became
15 Morgan Lewis partners as of February 12, 2003. Morgan Lewis hired approximately 100 former
16 Brobeck associates and 150 former Brobeck staff members on February 12, 13, and 14, 2003. On
17 February 13, 2003, Morgan Lewis executed a letter agreement with Equities Office Properties,
18 Brobeck's landlord, to lease the space at the One Market premises in San Francisco, where Brobeck
19 had its offices; the letter agreement set the rent to be paid by Morgan Lewis for the period beginning
20 February 12, 2003. Morgan Lewis also entered into a Purchase and Transition Agreement (PTA) with
21 Brobeck, effective February 14, 2003. Under that agreement, Morgan Lewis purchased all of the
22 furniture, fixtures and equipment (FFE), and personal property owned by Brobeck and located at the
23 One Market premises; Morgan Lewis purchased a license to use and create derivative works of all
24 information available on Brobeck's intranet, including all form agreements, as well as all information

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27 ¹Plaintiffs also asserted claims against defendant Brobeck. Brobeck moved to dismiss the
28 complaint or for summary judgment, but because it is currently in bankruptcy proceedings, the claims
against it are automatically stayed pursuant to 11 U.S.C. § 362.

1 available on Brobeck's internal document management system, other than client information for which
2 Morgan Lewis had not obtained access permission; and Brobeck agreed to continue to provide various
3 telecommunication services to Morgan Lewis employees previously employed by Brobeck. Morgan
4 Lewis issued a press release on February 13 announcing that it was "significantly expanding on the
5 West Coast" by hiring over 150 former Brobeck lawyers and emphasizing the continuity of client
6 relationships made possible by the transition of a large group of Brobeck lawyers to Morgan Lewis.
7 Several former Brobeck employees assert that Morgan Lewis began to conduct business at the One
8 Market premises no later than February 12.

9 Morgan Lewis previously moved for summary judgment on all of plaintiffs' claims. The court
10 (Wilken, J.) granted Morgan Lewis's motion in part, rejecting the federal WARN Act claim to the
11 extent it was based on the doctrine of successor liability or on Morgan Lewis's being Brobeck's alter
12 ego. The court denied Morgan Lewis's motion, in part, holding that a reasonable jury could find
13 Morgan Lewis liable as a purchaser of part or all of Brobeck's business. As to the state WARN Act
14 claim, the court held that Morgan Lewis could not be held liable as plaintiffs' employer but might be
15 held liable as Brobeck's successor. Because plaintiffs' § 17200 claim is derivative of its federal and
16 state WARN Act claims, the court denied Morgan Lewis's motion for summary judgment on that claim
17 as well. The court granted summary judgment for Morgan Lewis on plaintiffs' claim for an equitable
18 lien pursuant to *Jewel v. Boxer*, 156 Cal. App. 3d 171 (1984).² Morgan Lewis now moves for
19 summary judgment on plaintiffs' remaining federal and state WARN Act claims and on plaintiffs' §
20 17200 claim.

21 LEGAL STANDARD

22 "[Summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to
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25 ²*Jewel v. Boxer* holds that absent a partnership agreement to the contrary, all attorneys' fees
26 received on work in progress after the dissolution of a partnership are to be shared by the former
27 partners in accordance with their right to fees in the dissolved partnership. The Brobeck partners, in
28 amending their partnership agreement as part of their dissolution, specifically agreed that each Brobeck
partner could bring ongoing work to his or her new law firm. Plaintiffs did not oppose the motion
directed at this claim.

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” FED. R. CIV. PROC. 56(c). “Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The court draws all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The moving party may discharge its burden of showing that no genuine issue of material fact remains by demonstrating that “there is an absence of evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325. The burden then shifts to the nonmoving party to produce “specific evidence, through affidavits or admissible discovery material, to show that the dispute exists.” *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1409 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991).

DISCUSSION

I. FEDERAL WARN ACT CLAIM

The federal WARN Act requires an employer to give sixty days’ advance notice before any “plant closing” or “mass layoff” that causes an “employment loss.” 29 U.S.C. §§ 2101(a)(2), (3), 2102(a). The Act provides that an employer shall not order a plant closing or mass layoff until the end of the sixty-day period after the employer serves written notice of such an order on each affected employee. 29 U.S.C. § 2102(a). An employer who orders a plant closing in violation of § 2102 is liable for back pay and benefits to each employee who suffers a resulting employment loss. 29 U.S.C. § 2104. Section 2101(b) provides for the allocation of responsibility for giving notice between the buyer and seller of a business. It states, in relevant part, that

in the case of a *sale of part or all of an employer’s business* the seller shall be responsible for providing notice . . . up to and *including the effective date of the sale*. *After the effective date of the sale* of part or all of an employer’s business, the purchaser shall be responsible for providing notice.

29 U.S.C. § 2101(b) (emphasis added).

1 Morgan Lewis advances two contentions: First, that it was not responsible for giving notice
2 under the Act because it did not purchase “part or all of an employer’s business,” and, second, even if
3 it did, it did not become responsible for giving notice because the employees were terminated on the
4 effective date, not afterward.

5 A. *Purchase of Brobeck’s Business*

6 In denying Morgan Lewis’s prior motion, the court concluded that whether there was a sale of
7 all or part of a business within the meaning of the Act was a question of fact. Morgan Lewis argues that
8 extensive discovery since the prior ruling demonstrates that no assets were transferred from Brobeck to
9 Morgan Lewis other than the FFE, an insignificant part of Brobeck’s assets. It argues further that its
10 taking on of Brobeck partners, hiring of Brobeck employees, leasing of office space and retention of
11 former clients were the outcomes of discreet individual transactions, not a purchase of a part of the
12 business. However, as the court’s prior order found, Morgan Lewis did more than purchase a
13 relatively small quantity of tangible assets:

14 It leased Brobeck’s former premises, purchased access to Brobeck’s informational
15 infrastructure, obtained access to Brobeck’s client files, and emphasized lawyer
16 continuity in press releases geared toward convincing Brobeck’s clients to become
17 Morgan Lewis clients Morgan Lewis did put together a series of transactions that
18 allowed many of the same lawyers to practice law using much of the same infrastructure
19 with the explicit hope that this would allow it to acquire Brobeck’s clients.

20 Order, 2/17/04 at 7. Considering these facts in light of the functional understanding of the Act’s “sale
21 of part or all of an employer’s business” language adopted by the Ninth Circuit in *International*
22 *Alliance of Theatrical & Stage Employees & Moving Picture Machine Operators v. Compact*
23 *Video Services, Inc.*, 50 F.3d 1464, 1467 (1995), the court reached the conclusion that a reasonable
24 trier of fact could determine that there was a “sale of part or all of [Brobeck’s] business” within the
25 meaning of 29 U.S.C. § 2101(b). Nothing has been presented on the instant motion to lead the court
26 to alter its prior conclusion.

27 B. *Effective Date of Sale*

28 Assuming it were found that there was a sale of part or all of Brobeck’s business, Morgan
Lewis’s liability under the Act turns on whether it became responsible for giving notice of their
termination to the employees. The Act provides that the seller shall be responsible “up to and including

1 the effective date of the sale.” In their PTA, the parties specifically provided for the effective date of
2 their transaction; the PTA states that it is “Dated as of February 14, 2003 (the ‘Effective Date’).”
3 Brobeck gave notice of termination to all personnel on February 12, 2003, two days before the
4 stipulated effective date of the sale. The notice advised personnel that their last day of work would be
5 February 14, 2003. If Morgan Lewis purchased part or all of Brobeck’s business, the effective date of
6 that purchase was February 14 and under the Act, Brobeck remained responsible for giving notice “up
7 to and including the effective date.”

8 The terms of the PTA are significant because, in addition to providing for the purchase of FFE,
9 they furnish the indicia summarized in the preceding section of this Order on which plaintiffs rely in
10 contending that the transaction was a sale of the business, not merely of insignificant assets. If there
11 was a sale of Brobeck’s business, the PTA served the purpose of ensuring its uninterrupted operation.
12 Its terms must therefore be given effect.

13 Plaintiffs argue, however, that the evidence establishes that the purchase took place before the
14 mass layoff became effective on February 14, thus making Morgan Lewis responsible for providing
15 notice under the WARN Act. They argue that the effective date of the sale was February 12, when
16 Morgan Lewis voted to admit some sixty of Brobeck’s partners (with the expectation that they would
17 bring along some or all of their clients). While this group may have been admitted en masse, each
18 partner’s move to Morgan Lewis was his or her individual decision (as was that of individual clients).
19 Thus, their admission cannot be considered a sale of a business within the meaning of the WARN act.

20 Alternatively, plaintiffs argue that the purchase occurred before they were actually terminated
21 because the PTA was executed before February 14 and payment for the FFE occurred before the end
22 of the business day on February 14. Thus, they say, for a matter of hours they sat on Morgan Lewis
23 chairs and worked with its equipment. Plaintiffs contend that the Department of Labor has interpreted
24 the Act to mean that the obligation to notify employees under the WARN Act shifts from seller to buyer
25 not after the effective date of sale, but at the effective *time* of sale. 20 C.F.R. § 639.4(c). Relying on
26 this regulation, cited in dictum in *Oil, Chemical & Atomic Workers International Union v. CIT*
27 *Group/Capital Equipment Financial, Inc.*, 898 F. Supp. 451, 456 n.6 (S.D. Tex. 1995), plaintiffs
28 argue that because Brobeck’s FFE was to be exchanged for payment of \$2.1 million “not later than

2:00 p.m. California time on the Effective Date,” Morgan Lewis became responsible for notice at 2:00 p.m. on February 14, rather than the next day. This argument, too, must be rejected “because it is contrary to the plain language of the terms of the statute.” *Burnsides v. MJ Optical, Inc.*, 128 F.3d 700, 703 (8th Cir. 1997). As that court held, “[u]nder § 2101(b), the seller is the party responsible for giving notice during the effective date of the sale, and the asset purchase agreement declared it was ‘effective [the] 7th day of May.’” *Id.* Here, the effective date fixed in the PTA was February 14 and Brobeck thus remained responsible for notice to its employees up to and including February 14.

Finally, plaintiffs contend that Morgan Lewis became their employer on or about February 1, 2003, and thus assumed the notice obligation under the Act at that time. The court previously considered and rejected this argument, finding no evidence that Morgan Lewis ever entered an employer relationship with plaintiffs. After further discovery, plaintiffs still fail to present evidence of such a relationship. Plaintiffs base their argument on evidence that partners who joined Morgan Lewis received a full “draw” of anticipated profits for the month of February 2003. However, there is no evidence that Morgan Lewis ever paid any of the plaintiffs or exercised any control over their work. *See, e.g., Hale v. Arizona*, 993 F.2d 1387, 1394 (9th Cir.), *cert. denied*, 510 U.S. 946 (1993) (holding that factors indicative of employment include having the power to hire and fire, to control work schedules and conditions, to determine pay, and to maintain employment records).

II. CALIFORNIA LABOR ACT CLAIM

Plaintiffs also contend that Morgan Lewis is liable as a successor to Brobeck under California law.³ In its prior ruling, the court rejected the claim under California Labor Code §1401(a), which imposes liability on the employer, on the ground that, as previously discussed, there is no evidence Morgan Lewis ever entered into an employment relationship with plaintiffs. The court acknowledged

³It should be noted that since his appointment, the bankruptcy Trustee has pursued various claims on behalf of the Brobeck Estate and has evaluated claims against Morgan Lewis, including a claim that Morgan Lewis may be a successor to Brobeck. The Trustee ultimately concluded that a successor claim against Morgan Lewis would not be supported by the facts. While the Trustee’s determination is not dispositive of the issue, it is significant that the party with perhaps the greatest interest in pursuing such a claim has determined that the evidence fails to support such a claim.

1 that liability under the California Act can be imposed on Morgan Lewis only if it can be found to be
2 Brobeck's successor.

3 A purchaser of a business will not be held liable as a successor unless it purchases the
4 "principal assets" of another corporation and the facts fit into one of four exceptions to the general rule
5 of nonliability for purchasing entities. *Maloney v. Am. Pharm. Co.*, 207 Cal. App. 3d 282, 287
6 (1988) (citing *Ray v. Alad Corp.*, 19 Cal. 3d 22, 28 (1977)). Assuming, without deciding, that
7 Morgan Lewis purchased the "principal assets" of Brobeck, the transaction does not fit into any of the
8 four exceptions to successor liability.

9 The purchaser of the principal assets of another corporation does not assume the seller's
10 liabilities unless: (1) there is an express or implied agreement of assumption; (2) the transaction
11 amounts to a consolidation or merger of the two corporations; (3) the purchasing corporation is a mere
12 continuation of the seller; or (4) the transfer of assets to the purchaser is for the fraudulent purpose of
13 escaping liability for the seller's debts. *Ray*, 19 Cal. 3d at 28. There is no evidence that Morgan Lewis
14 agreed to assume Brobeck's debts or liabilities; or that it paid inadequate consideration for what it
15 purchased,⁴ or that the purchase was for the purpose of escaping liability for Brobeck's debts.
16 *Franklin v. USX Corp.*, 87 Cal. App. 4th 615, 625 (2001). Nor can Morgan Lewis's admission of a
17 group of Brobeck partners and its acquisition of the FFE be found to be a consolidation or merger of
18 the two firms or to make Morgan Lewis a mere continuation of Brobeck.

19 **III. SECTION 17200 CLAIM**

20 Because plaintiffs' § 17200 claim is derivative of their federal and state WARN Act claims, it
21 follows that summary judgment in favor of Morgan Lewis must be rendered on plaintiffs' § 17200
22 claim.

23 **CONCLUSION**

24
25 ⁴The PTA was an arm's-length negotiation between Brobeck, Morgan Lewis, and Citibank.
26 One of the negotiators for Citibank stated that the \$2.1 million price paid by Morgan Lewis for
27 Brobeck's FFE was a "very fair price," and one that Citibank and Brobeck could not have obtained in
28 an open market auction. Brobeck's Trustee also attested to the adequacy of the \$2.1 million price paid
by Morgan Lewis for Brobeck's assets.

1 Morgan Lewis has demonstrated that there is an absence of evidence to support plaintiffs'
2 claims. *Celotex*, 477 U.S. at 325. After discovery, plaintiffs have failed to produce evidence raising a
3 material dispute of fact. *Bhan*, 929 F.2d at 1409. Morgan Lewis's motion for summary judgment
4 must therefore be **GRANTED** and the case **DISMISSED**.

5 **IT IS SO ORDERED.**

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8 DATED: April 27, 2005

/s/

WILLIAM W SCHWARZER
SENIOR UNITED STATES DISTRICT JUDGE